Supreme Court, U. S.
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No. 80-114

In the Supreme Court of the United States

OCTOBER TERM, 1979

CURTIS R. WILHELM AND ESTELLE WILHELM, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In this federal income tax case, petitioner[1] seeks review of the decision below disallowing a theft loss deduction with respect to funds in two savings accounts that were established by his father.

The pertinent facts may be summarized as follows: Petitioner is the son of the late George J. Wilhelm, who died testate on August 14, 1972 (37 T.C.M. 1847-2, 1847-3).[2] Under the terms of the will, petitioner received one half of the decedent's residuary estate. Prior to his death,

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[1]References to petitioner are to Curtis R. Wilhelm. Estelle Wilhelm is a party solely because she filed a joint return with her husband for the year at issue.

[2]Petitioner has not reproduced the opinion of the Tax Court in the appendix to the petition. Our references to that opinion are to the unofficial CCH report.

petitioner's father had established two savings accounts, each of which was entitled "George J. Wilhelm In Trust For Silva Wilhelm" (37 T.C.M. at 1847-3).[3] Upon the decedent's death, the funds in these accounts, which totaled $13,500, passed to Silva Wilhelm and thus were not part of the decedent's residuary estate (37 T.C.M. at 1847-6).

On their 1973 federal income tax return, petitioners claimed a theft loss deduction in the amount of $13,500 with respect to these funds. In support of the claimed deduction, petitioners asserted that they were the rightful owners of the funds because one of the savings accounts had been established by the decedent as a result of fraud by either Silva Wilhelm or the decedent's attorneys and that Silva Wilhelm was not entitled to the proceeds of the other account because she had received an equal sum from the decedent during his lifetime (37 T.C.M. at 1847-6 to 1847-7). In this proceeding brought by petitioners in the Tax Court for redetermination of the deficiencies, the Tax Court upheld the Commissioner's disallowance of the claimed deduction, ruling that petitioners had failed to establish that they were the rightful owners of the funds in question (37 T.C.M. at 1847-6). The court of appeals affirmed (Pet. App. 1a-2a).

The courts below correctly ruled that petitioners were not entitled to the claimed theft loss deduction. Section 165 of the Internal Revenue Code of 1954 (26 U.S.C.) allows a deduction for losses arising from theft, as defined by state law, in the year in which the loss is discovered, provided that no claim for reimbursement or reasonable prospect for recovery exists in that year. Treasury

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[3]Silva Wilhelm was married to Gilbert E. Wilhelm, a son of the decedent who predeceased the decedent (37 T.C.M. at 1847-3).

Regulations on Income Tax, Section 1.165-1(d)(3) (26 C.F.R.); *Bellis* v. *Commissioner*, 540 F. 2d 448 (9th Cir. 1976). Here petitioners failed to establish that they were the rightful owners of the funds in the savings accounts in question and did not establish that any theft had occurred under state law. They also failed to show that there was no reasonable prospect of recovering the funds during the year in question (see 37 T.C.M. at 1847-6 to 1847-7). In these circumstances, they were not entitled to a theft loss deduction.[4]

It is therefore respectfully submitted that the petittion for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[4]Petitioners err in contending (Pet. 8) that the court of appeals' failure to hear oral argument violated their "right of a fair hearing." The court determined that oral argument was not needed in this case only after the observance of a careful procedure designed to safeguard due process. See *NLRB* v. *Local No. 42, Int. Ass'n of Heat & F.I. & A. Wkrs.*, 476 F. 2d 275 (3d Cir. 1973). Moreover, there is no constitutional requirement that oral argument be heard in every case in the courts of appeals. *FCC* v. *WJR*, 337 U.S. 265, 274-277 (1949).

Petitioners also assert (Pet. 8) that their constitutional rights were violated because they were unable to obtain the assistance of counsel in the Tax Court. It is well established, however, that the constitutional right to counsel applies only to criminal proceedings and not to civil suits such as a Tax Court proceeding. See, *e.g.*, *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977).

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